UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **Case No. 8:03-CR-77-T-30TBM**

HATIM NAJI FARIZ
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MOTION TO DISMISS COUNTS THREE AND FOUR OF THE INDICTMENT AND MEMORANDUM OF LAW IN SUPPORT

Defendant, HATIM NAJI FARIZ, by and through undersigned counsel, and pursuant to Federal Rule of Criminal Procedure 12(b)(3), moves this Honorable Court to dismiss Counts Three and Four of the Indictment. As grounds in support, Mr. Fariz states:

1. On February 19, 2003, Hatim Fariz and seven co-defendants were charged in a fifty-count indictment with multiple conspiracies and offenses. Count Three charges Mr. Fariz with conspiracy to knowingly provide material support and resources to a designated foreign terrorist organization, namely the Palestinian Islamic Jihad ("PIJ"), in violation of 18 U.S.C. § 2339B.

2. Mr. Fariz contends that Count Three should be dismissed on a number of grounds. First, Count Three fails to provide sufficient notice to Mr. Fariz of the allegations against him, in violation of the Fifth and Sixth Amendments to the U.S. Constitution. Count Three also contains admitted factual errors, calling into question whether the grand jury would have indicted Mr. Fariz under 18 U.S.C. § 2339B. Finally, because the statute under which the PIJ was designated a foreign terrorist organization is unconstitutional, the

designation cannot be used to impose criminal liability under Section 2339B. Count Three should therefore be dismissed.

3. Count Four alleges that Mr. Fariz conspired to violate Executive Order 12947, by making and receiving contributions of funds, goods, and services to and for the benefit of specially designated terrorists, in violation of 50 U.S.C. § 1701 *et seq.*, 31 C.F.R. § 595 *et seq.*, and 18 U.S.C. § 371.

4. Count Four should be dismissed because it fails to provide sufficient notice to Mr. Fariz of the allegations against him, and because it contains factual errors calling into question whether the grand jury would have indicted him for an offense. In addition, because the designations in and pursuant to the Executive Order were obtained in violation of the due process rights of the PIJ, the designation may not be used to form the basis of criminal liability as alleged in Count Four.

5. In the alternative, if the Court does not dismiss Counts Three and Four, Mr. Fariz respectfully requests that this Court strike the irrelevant and prejudicial assertions contained in these Counts, as further explained herein and in Mr. Fariz's Motion to Strike Surplusage and Motion to Strike as Surplusage Paragraphs 43(236), (240), (247), and (253) of the Indictment, filed separately.

MEMORANDUM OF LAW

I. The Court Should Dismiss Count Three Charging Mr. Fariz with Conspiracy to Provide Material Support and Resources under 18 U.S.C. § 2339B.

A. Overview of Count Three and 18 U.S.C. § 2339B.

Count Three of the indictment alleges that Mr. Fariz and some of his co-defendants,[1] from in or about 1988 to the date of the indictment, conspired to knowingly provide material support and resources to a designated foreign terrorist organization, the Palestinian Islamic Jihad, in violation of 18 U.S.C. § 2339B.[2] A foreign terrorist organization ("FTO"), for purposes of Section 2339B, is defined as "an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act." 18 U.S.C. § 2339B(g)(6). Section 219 of the Immigration and Nationality Act is codified at 8 U.S.C. §

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[1] Count Three charges all of the defendants in this case, except Muhammed Tasir Hassan Al-Khatib.

[2] Section 2339B provides, in pertinent part:

> Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

18 U.S.C. § 2339B(a)(1). Congress passed Section 2339B in 1996, and amended the statute in 2001 to increase the penalties from 10 to 15 years and to include the provision requiring a term of imprisonment of years or life if a person dies as a result. Pub. L. No. 107-56, § 810(d), 115 Stat. 272, 380 (2001).

1189.[3] *See* 18 U.S.C. § 2339B & historical note. Pursuant to 8 U.S.C. § 1189, the Secretary of State, in consultation with the Secretary of Treasury and the Attorney General, is authorized to designate an organization as a "foreign terrorist organization" if it (1) is a foreign organization, (2) that engages in terrorist activity or terrorism, as defined, or retains the capability and intent to do so, and (3) the terrorist activity or terrorism threatens the security of U.S. nationals or the United States' national security. 8 U.S.C. § 1189(a)(1).[4] On October 8, 1997, then Secretary of State Madeleine Albright designated the Palestinian Islamic Jihad - Shaqaqi faction ("PIJ") as a foreign terrorist organization. 62 Fed. Reg. 52650-01. The government relies on this designation in Count Three. *See* Doc. 1, Indictment, at 94, ¶ 3(t).

B. Count Three's Prejudicial References to Executive Order 12947 Should be Stricken.

Count Three improperly relies on Executive Order 12947, in which the President named terrorist organizations which threaten to disrupt the Middle East Peace Process. *See* Doc. 1, Indictment at 91 ¶ 3j; 93 ¶ 3p. In Executive Order 12947, the President designated organizations and individuals, now referred to as "specially designated terrorists" ("SDT"). These designations are irrelevant to a violation of Section 2339B. Instead, Section 2339B

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[3] The indictment incorrectly cites the provision of law under which the Secretary of State designated the PIJ as Title 18, United States Code, Section 219. Doc. 1, Indictment at 7, ¶ 22; 94, ¶ 3(t). The correct citation is 8 U.S.C. § 1189.

[4] The second designation criteria was amended in 2001 to include "terrorism," as defined in 22 U.S.C. § 2656f(d)(2). Pub. L. No. 107-56, § 411(c), 115 Stat. 272, 349 *(2001).*

is contingent on the designation of "foreign terrorist organizations" by the Secretary of State pursuant to 8 U.S.C. § 1189. Because the references to the Executive Order and the designations under it are irrelevant and prejudicial, they should be stricken from Count Three as surplusage. *See* Fed. R. Crim. P. 7(d); *United States v. Awan*, 966 F.2d 1415, 1426 (11th Cir. 1992).

Count Three is particularly misleading as pled, because the majority of the alleged conduct described as the "means and methods" of the conspiracy occurred prior to the Secretary's designation in 1997, and relies instead on the Executive Order. Specifically, after describing the Executive Order in paragraph 3(j), Count Three asserts: "Notwithstanding this prohibition and the defendants' awareness of it, the defendants did and would continue to provide services and support to HAMAS, PIJ, and Fathi Shiqaqi . . . ." Doc. 1, Indictment, at 91 ¶ 3(l). The indictment then indicates that Ramadan Abdullah Shallah was designated as a specially designated terrorist under the Executive Order in November 1995, and continues to allege conduct following this designation. *See id.* at 93 ¶ 3(p). The indictment does not cite to the Secretary of State's designation of PIJ as a foreign terrorist organization until the third to the last paragraph of the "means and methods" section, and then claims that the defendants engaged in conduct "[n]otwithstanding this *third announced legal prohibition* against providing assistance to designated terrorist organizations and individuals." *Id.* at 94 ¶¶ 3(t), (u) (emphasis added).

Count Three, in this respect, confuses the proper predicate for an offense under 18 U.S.C. § 2339B. The danger of the indictment's error is that it would allow the jury to

convict Mr. Fariz on improper grounds. Accordingly, in light of the prejudicial and irrelevant pleading of Executive Order 12947 in Count Three, the references to the Executive Order should be stricken.[5]

C. Count Three Fails to Provide Sufficient Notice to Mr. Fariz of the Allegations Against Him, Prejudicing His Ability to Prepare a Defense in this Case.

The Fifth Amendment to the U.S. Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. The Sixth Amendment guarantees that "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. The Federal Rules of Criminal Procedure require that the indictment "be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . . ." Fed. R. Crim. P. 7(c)(1).

A criminal pleading must "contain[] the elements of the offense intended to be charged, and sufficiently apprise[] the defendant of what he must be prepared to meet." *Russell v. United States*, 369 U.S. 749, 763 (1962) (citations and internal quotation marks

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[5] The government has separately alleged a violation of the Executive Order in Count Four, further underscoring the argument that the Executive Order is irrelevant to Count Three. If the indictment charges two separate offenses in one count – the alleged violations of the Executive Order and Section 2339B – then the references to the Executive Order and to alleged conduct notwithstanding this "prohibition" should be further stricken as duplicitous. *See United States v. Schlei*, 122 F.3d 944, 977-80 (11th Cir. 1997) (holding that district court abused its discretion in denying motion to strike on grounds of duplicity, where separate offenses were charged in one count and jury may not have reached unanimous verdict as to one offense).

omitted); *United States v. Bobo*, No. 02-11011, 2003 WL 22006279, at *6 (11th Cir. Aug. 26, 2003). As the Supreme Court explained in *Russell*, "[a]n indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the accusation against him * * * is defective, although it may follow the language of the statute.'" 369 U.S. at 765 (citation omitted); *Bobo*, 2003 WL 22006279, at *6. Moreover, while "the language of the statute may be used in the general description of an offense, . . . it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Russell*, 369 U.S. at 765 (citations omitted); *Bobo*, 2003 WL 22006279, at 6.

As noted above, Count Three is defective since it relies on an improper legal predicate. Furthermore, the indictment in this case does not provide sufficient notice to Mr. Fariz of the conspiracy and conduct for which he and the other co-defendants are alleged to be criminally liable under 18 U.S.C. § 2339B. Count Three neither tracks the language of the statute nor provides sufficient factual allegations to state the alleged offense. In particular, Count Three fails to specify the types of "material support or resources" that the defendants allegedly provided to the PIJ. While the indictment cites to Section 2339A which defines "material support or resources," it fails to specify which of the seventeen types of material support or resources defined in Section 2339A are alleged to be involved in this case.[6] *See Bobo*, 2003 WL 22006279, at *7 (indicating that indictment alleging a violation

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[6] Material support or resources are currently defined as:

of 18 U.S.C. § 1347(1), which prohibits defrauding a health care benefit program in connection with the delivery of or payment for health care benefits, items, or services, failed to specify whether the defendant was allegedly trying to defraud the program of benefits, items, services, or money); *Van Liew v. United States*, 321 F.2d 664, 669-73 (5th Cir. 1963) (finding indictment invalid where it failed to specify what aspect of the law was violated).[7] The failure to specify the types of material support or resources alleged in this case impairs Mr. Fariz's ability to prepare his defense, including preparing pretrial motions and for trial.

The factual allegations in this case do not cure this problem, since they fail to particularize the charges. On the contrary, the alleged "means and methods" and "overt acts" include allegations, such as pure speech, that do not constitute material support or resources, as defined in Section 2339A. *See Van Liew*, 321 F.2d at 670 ("But this is not a federal crime unless it contravenes a statute."). The indictment also contains vague assertions in the

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> currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

18 U.S.C. § 2339A(b); *see* 18 U.S.C. § 2339B(g)(4). In 2001, Congress amended this definition to include "monetary instruments" and "expert advice or assistance." Pub. L. No. 107-56, § 805(a)(2), 115 Stat. 272, 377 (2001). These additions do not apply retroactively. *See United States v. Sattar*, No. 02 CR. 395, 2003 WL 21698266, at *4 n.4 (S.D.N.Y. July 22, 2003).

[7] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

alleged means and methods and overt acts of the conspiracy, providing insufficient notice to Mr. Fariz of whether a crime is even alleged. In particular, the indictment alleges conduct such as "support activities" and "assistance," which fail to provide sufficient notice of the alleged offense by Mr. Fariz and his alleged co-conspirators. *See, e.g.*, Doc. 1, Indictment, at 94 ¶ 3(s) ("support activities"); 3(u) ("assistance" and "activities in support"). In this respect, the indictment fails to comply with Rule 7(c)'s requirement that the indictment be "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). Mr. Fariz cannot adequately prepare for trial or pretrial motions based on vague assertions of alleged conduct. *See Russell*, 369 U.S. at 765, 768-69 & n.15. While Mr. Fariz has separately filed a motion for bill of particulars, a bill of particulars cannot cure defects in the indictment. *See, e.g., id.* at 769-70; *Van Liew*, 321 F.2d at 673. Accordingly, Count Three should be dismissed.

D. Count Three Should Be Dismissed as to Mr. Fariz Because of Admitted Errors in the Allegations in the Indictment.

Count Three's charge against Mr. Fariz also fails because of admitted factual errors, calling into question whether Mr. Fariz would have been indicted by the grand jury. Count Three incorporates as the alleged overt acts paragraphs 197 through 255 of Count One (hereinafter "Overt Acts"). Overt Acts 236, 240, 247, and 253 refer to alleged conversations in which Mr. Fariz spoke with or about Abd Al Aziz Awda, allegedly a founder and spiritual leader of the PIJ, about fund-raising and distributing money. The government has notified the Court and the parties, however, that Overt Act 253 involves an alleged conversation

between Mr. Fariz and an alleged PIJ activist,[8] but not Awda. Doc. 71, Government's Supplement to the Record, at 1. The government further stated that the references to Awda in Overt Acts 236, 240, and 247 are "suspect," and that the government was withdrawing any of its assertions it made at the detention hearing that Mr. Fariz was in contact with Awda as alleged in these paragraphs. *Id.* at 1-2.[9] Since the government has called into question the identification of Awda in these paragraphs – and only these paragraphs refer to alleged conversations where Mr. Fariz spoke to or about Awda – these admissions belie the Count Three allegation that "Throughout 2002, HATIM NAJI FARIZ spoke by telephone with ABD AL AZIZ AWDA, who was overseas, about transfers of funds to ABD AL AZIZ AWDA to be used for PIJ." Doc. 1, Indictment, at 95 ¶ 3(v).

Significantly as to Mr. Fariz, the government's concession calls into question whether the grand jury would have indicted Mr. Fariz. *See United States v. Al-Arian*, 2003 WL 21078080, at *7 (M.D. Fla. Apr. 10, 2003) (Order of U.S. Magistrate Judge Mark A. Pizzo) ("Now, Fariz's discussion on May 26, 2002 (overt act 236), can reasonably be interpreted as one about acquiring donations for legitimate Palestinian charities," and "The conversation on November 10, 2002 [overt act 253], as corrected, adds little to Fariz's purported PIJ involvement."). Without these inaccurate assertions, the remaining allegations involving Mr. Fariz fail to allege that he conspired to provide material support or resources to the PIJ, as

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[8] The government has declined to identify this "PIJ activist."

[9] Mr. Fariz has filed a separate motion to strike paragraphs 236, 240, 247, and 253.

defined in Section 2339A. *See id.* at * 6-*7; Overt Acts 208, 215, 238-39, 242, 244-46, 249-51, and 255.

The indictment against Mr. Fariz is therefore insufficient and must be dismissed. Otherwise, Mr. Fariz's Fifth Amendment right to have charges brought against him by a grand jury would be violated. *See Russell*, 369 U.S. at 770 ("To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."); *cf. Van Liew*, 321 F.2d at 669 (indicating that where "the offense is not plainly stated and is made so only by a process of interpretation, there is no assurance that the Grand Jury would have charged such an offense"); *Standard Oil Co. v. United States*, 307 F.2d 120, 130 (5th Cir. 1962) ("While it is true that indictments are to be construed in a common sense way, where one is subject equally to one of two interpretations, one of which states an offense and the other which does not, the indictment is insufficient since there is no assurance that the Grand Jury would have returned the indictment had the words been employed in the sense necessary to sustain the conviction."). Accordingly, Mr. Fariz respectfully requests that this Court dismiss Count Three against him.

Conclusion

Because the indictment fails to provide sufficient notice of an alleged offense under Section 2339B, it is invalid. Count Three is not accompanied by a set of facts that would

provide sufficient notice of the specific offense allegedly committed. The indictment alleges conduct that does not constitute, or that is so vague it could not be understood to constitute, "material support or resources" to a designated terrorist organization. Moreover, with respect to Mr. Fariz, the allegations contain significant factual errors, calling into question whether the grand jury would have indicted Mr. Fariz under 18 U.S.C. § 2339B. For these reasons, Count Three should be dismissed. Alternatively, the improper references to the Executive Order should be stricken, and the inaccurate assertions against Mr. Fariz must be removed.

E. Because the Designation of the Palestinian Islamic Jihad as a Foreign Terrorist Organization Was Obtained Pursuant to an Unconstitutional Statute, 8 U.S.C. § 1189, the Designation Cannot Be Relied upon to Prosecute Mr. Fariz under 18 U.S.C. § 2339b.

Section 2339B prohibits the provision of material support or resources to designated foreign terrorist organizations. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Secretary of State has the power to designate a group as a "foreign terrorist organization." 8 U.S.C. § 1189; *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 196 (D.C. Cir. 2001). As the D.C. Circuit has observed, the "consequences of that designation are dire." *Id.* Once an organization is designated, any funds that the organization has in any financial institution within the United States are blocked, representatives and some members of the organization are barred from entry into the United States, and, most significant to this case, all persons subject to U.S. jurisdiction are prohibited from "knowingly providing material support or resources" to that organization. *Id.* (citations omitted). On October 8, 1997, the Secretary of State designated the Palestinian

Islamic Jihad - Shaqaqi faction ("PIJ") as a foreign terrorist organization. 62 Fed. Reg. 52650-01.

The designation of the PIJ as a "foreign terrorist organization," however, was obtained pursuant to a statute, 8 U.S.C. § 1189, that is unconstitutional since it violates the due process rights of the designated organizations. *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1055-59 (C.D. Cal. 2002); *see National Council of Resistance of Iran,* 251 F.3d at 200. As a result, the designation cannot form the basis of a criminal offense under Section 2339B.

1. Overview of Section 1189

The D.C. Circuit is charged with the responsibility of reviewing an organization's challenge to its designation as a "foreign terrorist organization." 8 U.S.C. § 1189(b)(1). The D.C. Circuit has observed that while the statutory scheme uses language similar to the Administrative Procedure Act – an agency compiles an administrative record and makes findings that are then subject to judicial review – "the similarity to process afforded in other administrative proceedings ends there." *National Council of Resistance of Iran*, 251 F.3d at 196. The D.C. Circuit described at length:

> The unique feature of this statutory procedure is the dearth of procedural participation and protection afforded the designated entity. At no point in the proceedings establishing the administrative record is the alleged terrorist organization afforded notice of the materials used against it, or a right to comment on such materials or the developing administrative record. Nothing in the statute forbids the use of "third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities . . . ." The Secretary may base the findings on classified material, to which the

organization has no access at any point during or after the proceeding to designate it as terrorist.

Id. (citation omitted).

While the organization may then seek judicial review of the designation in the D.C. Circuit, the court found that its review is limited. *Id.* at 196-97.[10] As to the nature and scope of its review, the D.C. Circuit further observed:

> Review is based solely upon the administrative record. Granted this is not in itself an unusual limitation, but one common to many administrative reviews. However, under the AEDPA the aggrieved party has had no opportunity to either add to or comment on the contents of that administrative record; and the record can, and in our experience generally does, encompass "classified information used in making the designation," as to which the alleged terrorist organization never has any access, and which the statute expressly provides the government may submit to the court *ex parte* and *in camera*. *id.* § 1189(b)(2).
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> The scope of judicial review is limited as well. . . . Again, this limited scope is reminiscent of other administrative review, but again, it has the unique feature that the affected entity is unable to access, comment on, or contest the critical material. Thus the entity does not have the benefit of meaningful adversary proceedings on any of the statutory grounds, other than procedural shortfalls so obvious a Secretary of State is not likely to commit them.

Id.

The designation is published in the Federal Register seven days after the Secretary provides classified notice to specified members of Congress of the intent to designate the organization and the factual basis and findings in support. 8 U.S.C. § 1189(a)(2)(A). The

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[10] Only the organization may challenge its designation under Section 1189. *See* 8 U.S.C. § 1189(b)(1); *Rahmani*, 209 F. Supp. 2d at 1054. Significantly, Section 1189 attempts to foreclose judicial review of the validity of the designation by a criminal defendant. *See* 8 U.S.C. § 1189(a)(8). This provision is discussed in Part I.E.3, *infra.*

designation is effective, for purposes of 18 U.S.C. § 2339B, upon publication in the Federal Register. 8 U.S.C. § 1189(a)(2)(B). The designation remains in effect for a two-year period, unless Congress or the Secretary revokes the designation. 8 U.S.C. § 1189(a)(4)-(6). The Secretary may redesignate an organization as an FTO for successive two-year periods. 8 U.S.C. § 1189(a)(4)(B).

2. Section 1189 Violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

Section 1189 is unconstitutional, since, by its own terms, it violates the due process rights of organizations designated under the statute. The district court in *United States v. Rahmani* found that under the statute's express terms, an organization is not provided any notice of its proposed designation. 209 F. Supp. 2d at 1048. The organization is also not provided the opportunity to object to the materials made part of the administrative record or to submit additional materials for the Secretary's consideration. *Id.* at 1055, 1058. The court thus concluded that Section 1189 does not provide the opportunity to be heard at a meaningful time or in a meaningful manner. *Id.* at 1058. Accordingly, the court held that Section 1189 is unconstitutional on its face as violative of due process. *Id.*

The D.C. Circuit has also concluded that the application of the statute violates the due process rights of designated organizations. In *National Council of Resistance of Iran*, the D.C. Circuit determined that while the Secretary had complied with the statute in designating the organizations, the designation violated the due process rights of the organizations under

the Fifth Amendment to the U.S. Constitution. 251 F.3d at 196.[11] Specifically, the court concluded that the Secretary's designation deprived the organization of its property rights without due process. *Id.* at 204-08. The court held that, with respect to future designations, the Secretary must provide pre-designation notice, unless the Secretary could demonstrate that post-designation notice would be necessary to avoid impinging on security and foreign policy goals. *Id.* at 208. The D.C. Circuit further indicated that the Secretary must provide the organization a hearing, with notice of the unclassified materials upon which the designation relies, and the opportunity to present its own evidence to rebut the administrative record. *Id.* at 209. Finally, the court noted that "[w]hile not within our current order, we expect that the Secretary will afford due process rights to these and other similarly situated entities in the course of future designations." *Id.*[12]

Section 1189, by its own terms, does not provide due process to the organizations designated as foreign terrorist organizations. *Rahmani*, 209 F. Supp. 2d at 1058. Indeed, as the D.C. Circuit noted, the Secretary's designation of the two organizations "was in

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[11] The D.C. Circuit had previously declined to find a due process violation where the organization did not have a presence in the United States. *See People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999).

[12] While the D.C. Circuit did not require that the designation of the organization involved in that case be revoked, the court made this decision in light of the "foreign policy and national security concerns asserted by the Secretary in support of those designations" and because the designation was due to expire within four months. *Id.* at 209. In a later opinion rejecting the organization's challenge to its designation, the D.C. Circuit noted that the prior designation of the organization was not moot, since there existed the possibility of prosecutions under Section 2339B under the earlier designation. *People's Mojahedin Org. of Iran v. Department of State*, 327 F.3d 1238, 1244 n.2 (D.C. Cir. 2003).

compliance with the statute," but the designation violated the due process rights of the organizations. *National Council of Resistance of Iran*, 251 F.3d at 196. While the D.C. Circuit directed the Secretary of State to afford due process with respect to future designations, the D.C. Circuit's direction does not change the conclusion that Section 1189 is facially unconstitutional. *See Rahmani,* 209 F. Supp. 2d at 1056-57; *see also Tennessee Valley Auth. v. Whitman*, 336 F.3d 1236, 1258-59 (11th Cir. 2003) (indicating that statutory scheme was in violation of the Due Process Clause of the Fifth Amendment since it failed to provide adjudication prior to the agency's issuance of an administrative compliance order, and that the agency could not voluntarily undertake adjudication before issuing its order to "save" the statute, since the statute was not subject to such an interpretation), *petition for reh'g and reh'g en banc denied* (11th Cir. 2003).[13] Mr. Fariz therefore respectfully requests that this Court similarly find that Section 1189 is unconstitutional.

3. Because Section 1189 Is Unconstitutional, the Designation of the PIJ under this Statute May Not Be Used to Impose Criminal Liability under Section 2339b.

The consequence of Section 1189's unconstitutionality is that a designation under the statute cannot be used to form the basis of a criminal prosecution under Section 2339B. In *Rahmani*, the court reached this conclusion, reasoning that a designation pursuant to Section 1189 "is a nullity and cannot serve as a predicate in a prosecution for [a] violation of Section

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[13] Even so, Section 1189 would also be unconstitutional as applied to the PIJ since the statute denies due process by failing to provide for predesignation notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *See Rahmani*, 209 F. Supp. 2d at 1056 n.14.

2339B." 209 F. Supp. 2d at 1059; *see also United States v. Mendoza-Lopez*, 481 U.S. 828, 840-42 (1987) (holding that where constitutional due process errors occurred in deportation proceeding, the deportation could not be used to support a criminal conviction under 8 U.S.C. § 1326). Mr. Fariz similarly asserts that the designation of the PIJ under Section 1189 may not be used in the instant prosecution.

Section 1189(a)(8) attempts to foreclose a criminal defendant's ability to assert the validity of the designation as a defense. This subsection provides that "a defendant in a criminal action . . . shall not be permitted to raise any question concerning the validity of the issuance of such designation or redesignation as a defense or an objection at any trial or hearing." 8 U.S.C. § 1189(a)(8). This provision does not prevent Mr. Fariz from challenging the constitutionality of Section 1189 in this Court. *Rahmani*, 209 F. Supp. 2d at 1054-55; *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (requiring a heightened showing from Congress that it intended to preclude judicial review of constitutional claims "in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim") (citations omitted); *Johnson v. Robison*, 415 U.S. 361, 365-74 & n.5 (1974) (holding that statute precluding judicial review of "decisions of the Administrator [of Veterans' Affairs] on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors . . ." did not preclude judicial review of constitutionality of veterans' benefits legislation).

Mr. Fariz's right to due process thus requires his ability to assert this challenge to Section 1189's constitutionality. As the *Rahmani* Court observed:

> Section 1189(b)(1) only provides a right to judicial review to designated foreign terrorist organizations. Combined with Section 1189(a)(8), individual defendants facing a Section [2339B] prosecution never have an opportunity to challenge the underlying designation. Thus, Section 1189 violates the defendants' due process rights because defendants, upon a successful Section [2339B] prosecution, are deprived of their liberty based on an unconstitutional designation they could never challenge.

209 F. Supp. 2d at 1054-55. *Cf. Mendoza*, 481 U.S. at 834-37 (holding that even where a "lawful" deportation was not an element of an offense under 8 U.S.C. § 1326, and though the text and legislative history of Section 1326 did not indicate a congressional intent to permit a challenge to the validity of the deportation in a criminal proceeding under that statute, "[i]f [Section 1326] envisions that a court may impose a criminal penalty for reentry after *any* deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been, the statute does not comport with the constitutional requirement of due process.").

The due process concerns raised by Section 1189(a)(8) are particularly demonstrated in this case. Section 1189 attempts to preclude Mr. Fariz from seeking judicial review of the validity of the designation, either in a civil case in the D.C. Circuit or in this criminal matter. *See* 8 U.S.C. § 1189(a)(8), (b)(1). Even though Section 1189 provides judicial review to designated organizations in the D.C. Circuit, that court has determined both that Section 1189's terms do not provide due process to designated organizations and that its own review of the designations is "quite limited." *National Council of Resistance of Iran*, 251 F.3d at

196-97; *see also* H.R. Rep. No. 104-383, at 180 n.15 (1995) (dissenting views) ("Although the bill grants organizations 30 days after they have been designated as 'terrorist' to seek judicial review in the D.C. Circuit Court of Appeals, this is unlikely to provide the opportunity for any meaningful review.").[14] In this case, there has been no judicial review of PIJ's designation under Section 1189, since the organization apparently has not challenged its designation.[15] Mr. Fariz's ability to assert a defense in this criminal case should not depend on whether another party, namely the PIJ, challenges its designation under 1189 as violative of its due process rights.[16]

Accordingly, Mr. Fariz should be able to challenge, and herein challenges, the constitutionality of Section 1189. Because the statute under which PIJ was designated is unconstitutional, the designation cannot be used to form the basis of criminal liability under 18 U.S.C. § 2339B. Count Three should therefore be dismissed.

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[14] The lack of meaningful judicial review raises a further constitutional problem: "the statutory scheme unconstitutionally delegates judicial power to a non-Article III tribunal." *See Tennessee Valley Auth.*, 336 F.3d at 1259 (citations omitted).

[15] A review of Westlaw and PACER reveals no litigation in which PIJ challenges its designation under Section 1189.

[16] Based on the foregoing arguments, Mr. Fariz respectfully disagrees with the *Sattar* court's analysis of the due process issues involved in these designations. *See Sattar*, 2003 WL 21698266, at *12-*15. Moreover, at this stage, Mr. Fariz is challenging the constitutionality of the designation statute.

Conclusion

Count Three violates Mr. Fariz's constitutional rights in a number of ways. The third count of the indictment violates Mr. Fariz's rights by presenting an improper basis for a violation of 18 U.S.C. § 2339B through its repeated reliance on Executive Order 12947. Furthermore, Mr. Fariz's constitutional rights are impinged by the indictment's use of inaccurate factual allegations and by the indictment's vague allegations. Finally, Count Three threatens to impose criminal liability on Mr. Fariz based on a predicate – the designation of the PIJ as a foreign terrorist organization – that was obtained pursuant to an unconstitutional statute. Because of these significant constitutional errors, Count Three must be dismissed.

II. The Court Should Dismiss Count Four Alleging that Mr. Fariz Conspired to Make and Receive Contributions of Funds, Goods, and Services to or for the Benefit of the Palestinian Islamic Jihad, Abd Al Aziz Awda, Fathi Shiqaqi, and Ramadan Abdullah Shallah.

A. Overview of Count Four and Executive Order 12947.

On January 23, 1995, President Clinton signed Executive Order 12947, titled, "Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process" (hereinafter the "Executive Order"). Exec. Order No. 12947, § 1(a), 60 Fed. Reg. 5079 (Jan. 23, 1995). The Executive Order blocks all property and interests in property of: (1) the twelve organizations identified in the Annex to the Executive Order; (2) foreign persons designated by the Secretary of State, in coordination with the Secretary of Treasury and the Attorney General, because they (a) have committed or pose a significant risk of committing acts of violence that have the purpose or effect of disrupting the Middle East peace process, or (b) assist in, sponsor, or provide financial, material, or technological support for, or services in support of, such acts of violence; and (3) persons determined by the Secretary of Treasury, in coordination with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of the foregoing persons. *Id.*

In addition to blocking the property of these persons, the Executive Order prohibits any transaction or dealing by a United States person (including U.S. citizens) or within the United States in property or interests of these designated persons, "including the making or receiving of any contribution of funds, goods, or services to or for the benefit of such

persons." Exec. Order No. 12947, § 1(b), 2(c), 60 Fed. Reg. at 5079-80. The Executive Order also prohibits "any transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order." Exec. Order No. 12947, § 1(c), 60 Fed. Reg. at 5079.

The Executive Order 12947 lists the Palestinian Islamic Jihad-Shiqaqi faction ("PIJ") as one of the twelve terrorist organizations which threaten to disrupt the Middle East Peace Process. *See* Executive Order 12947, Annex, 60 Fed. Reg. at 5081. On January 25, 1995, the Department of the Treasury issued the list of "specially designated terrorists." This list included PIJ, Abd Al Aziz Awda, who is a co-defendant in this case, and Fathi Shaqaqi. 60 Fed. Reg. 5084 (Jan. 25, 1995). On November 27, 1995, the Department of the Treasury added Ramadan Abdullah Shallah, who is also a co-defendant in this case, as a specially designated terrorist. 60 Fed. Reg. 58,435 (Nov. 27, 1995).

B. Count Four Fails to Provide Sufficient Notice to Mr. Fariz of the Allegations Against Him and Contains Factual Errors, Calling into Question Whether Mr. Fariz Would Have Been Indicted by the Grand Jury.

Count Four alleges that from a date no later than January 25, 1995, Mr. Fariz, along with some of the co-defendants,[17] conspired knowingly and willfully to violate Executive Order 12947, by making and receiving contributions of funds, goods, and services to or for the benefit of PIJ, Awda, Shiqaqi, and Shallah, in violation of 50 U.S.C. § 1701 *et seq.* and

[17] Count Four does not charge Awda or Al-Khatib.

31 C.F.R. § 595 *et seq.*, all in violation of 18 U.S.C. § 371. Count Four incorporates as the "means and methods" of the conspiracy Part B of Count Three. Part B, however, is the alleged "agreement" under Section 2339B. Therefore, Count Four does not specifically incorporate alleged means and methods of the conspiracy. Count Four incorporates as the alleged overt acts paragraphs 122 through 255 of Count One. The overt acts alleged in Count Four involving Mr. Fariz are the same overt acts alleged in Count Three, except that Count Four also includes Overt Act 176.

These allegations provide insufficient notice of the charges against Mr. Fariz and fail to allege that Mr. Fariz conspired to violate Executive Order 12947 by making and receiving contributions of funds, goods, and services to or for the benefit of PIJ, Awda, Shiqaqi, and Shallah. All of the allegations involving Mr. Fariz are alleged telephone conversations. The President, however, does not have the authority to regulate or prohibit "any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value." 50 U.S.C. § 1702(b)(1); *see also* 31 C.F.R. § 595.206(a).

Moreover, as with Count Three, the government's admission that Awda is misidentified in Overt Act 253, and that the identification of Awda in Overt Acts 236, 240, and 247 is suspect, calls into question whether the grand jury would have indicted Mr. Fariz. The government's admission concerning Awda is particularly significant as to Count Four, since the Department of the Treasury has listed Awda as a specially designated terrorist. While the government claims that the person involved in Overt Act 253 is a "PIJ activist," this information was presumably not presented to the grand jury.

The allegations against Mr. Fariz fail to provide sufficient notice of the charges against him and include admitted factual errors significant to the charge against Mr. Fariz in Count Four. Accordingly, Count Four should be dismissed to avoid a denial of Mr. Fariz's rights to a grand jury indictment and to be informed of the charges against him. *See Russell*, 369 U.S. at 770; Fed. R. Crim. P. 7(c)(1); *cf. Van Liew*, 321 F.2d at 669; *Standard Oil Co.*, 307 F.2d at 130.

C. Because the Designation of the PIJ in or Pursuant to Executive Order 12947 Violated the Due Process Rights of the PIJ, the Designation Should Not Be Used to Form the Basis of Criminal Liability in this Case.

The designation of an organization or individual as a specially designated terrorist in or pursuant to Executive Order 12947 carries significant consequences, including the blocking of all of the SDT's property and interests in property and prohibiting all transactions and dealings by U.S. persons or within the United States in property or interests in property of SDTs. *See* Exec. Order No. 12947, § 1(a), (b), 60 Fed. Reg. at 5079. Thus, as with the designation of organizations as foreign terrorist organizations under 8 U.S.C. § 1189,[18] the designation of an organization or individual as an SDT implicates due process rights. *See Holy Land Found. v. Ashcroft*, 333 F.3d 156, 163 (D.C. Cir. 2003) ("A designation under [Section 1189] carries a similar implication to those under the Executive Order at issue in this case."). Where the Executive Order and agency action designate SDTs without notice and an opportunity to present evidence to rebut the administrative record, the designation

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[18] *See* Part I.E.2, *supra.*

violates the SDT's due process rights. *See id.* at 163-64 (finding that the due process rights of the organization had been satisfied, where the organization had been redesignated in 2002 after being provided notice and an opportunity to respond).

The designation of the PIJ as a specially designated terrorist, in the absence of predesignation notice and an opportunity to be heard at a meaningful time and in a meaningful manner, is unconstitutional since it violates the due process rights of PIJ. *See Holy Land Found.*, 333 F.3d at 163-64; *National Council of Resistance of Iran*, 251 F.3d at 196; *Rahmani*, 209 F. Supp. 2d at 1054-59. Thus, as explained more fully in Part I.E.3, *supra*, the designations of PIJ obtained without due process may not form the basis of criminal liability in this case. *See Rahmani*, 209 F. Supp. 2d at 1058-59; *see also Mendoza-Lopez*, 481 U.S. at 842.

III. Conclusion

WHEREFORE, Mr. Fariz respectfully requests that this Court dismiss Counts Three and Four. Alternatively, Mr. Fariz respectfully requests that this Court strike the irrelevant and prejudicial references in the indictment, as further explained herein and in Mr. Fariz's motions to strike.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of October, 2003, a correct copy of the foregoing has been furnished by hand delivery to Terry Zitek, Assistant United States Attorney, 400 N. Tampa Street, Suite 3200, Tampa, Florida 33602 and to the following by U.S. Mail:

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